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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALABAMA DEPARTMENT OF REVENUE,
Petitioner,

v.

PILOT PETROLEUM CORPORATION and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT PILOT PETROLEUM CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether Pilot Petroleum Corporation, having been sued in the Eastern District of Louisiana by an agent of the State of Alabama to collect an Alabama fuel excise tax, was entitled to assert the Import-Export Clause of the U.S. Constitution as a defense.

B. Whether the State of Alabama is constitutionally prohibited by the Import-Export Clause from levying a direct tax on an export in transit to a foreign country.

LIST OF PARTIES AND RULE 29.1 NOTATION

The parties to the proceedings below were the Louisiana Land and Exploration Company (respondent-plaintiff), Pilot Petroleum Corporation (respondent-defendant), and State of Alabama, Department of Revenue (petitioner-intervenor).

Pursuant to Rule 29.1, respondent-defendant, Pilot Petroleum Corporation, certifies that there is no parent or subsidiary of this company to be listed.

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RESPONDENT PILOT PETROLEUM CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Pilot Petroleum Corporation ("Pilot"), respectfully prays that the Court deny the writ of certiorari sought by the Alabama Department of Revenue ("Alabama") in the above-entitled proceeding.

For the reasons set forth below, the Fifth Circuit's decision neither violates the Tax Injunction Act or principles of federal-state comity nor departs from the controlling decisions of this Court concerning U.S. Const. art. I, § 10, cl. 2, the Import-Export Clause. The Fifth Circuit properly held that the Alabama fuel tax as applied in this case was an unconstitutional impost on an export

in transit. There are no compelling reasons to grant certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., art. I, § 10, cl. 2.

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .
>
> * * * *

46 U.S.C. § 883:

> "No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise . . . between points in the United States . . . either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by . . . citizens of the United States. . . ."
>
> * * * *

28 U.S.C. § 1341:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.
>
> * * * *

The applicable Alabama statutes are Sections 40-1-34, 40-12-191, 40-17-30, 40-17-31, 40-17-32, 40-17-33, and 40-17-40. Copies of these provisions are found in Appendix E to this Brief in Opposition and in Appendix H of the Alabama Department of Revenue's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Alabama's petition for a writ of certiorari misconstrues the governing terms of the contract of sale of jet fuel from Louisiana Land & Exploration Company ("LL&E") to Pilot and the controlling Federal Statute, 46 U.S.C. § 883. The contract and statute establish as a matter of fact and law that transfer of title and possession of the jet fuel took place aboard the Liberian flag Motor Tanker MARYANNE, which was precluded by law from redelivering the cargo to any place in the United States. Thus, at the moment of sale and delivery by LL&E to Pilot and the imposition of the tax by Alabama, the cargo was irretrievably in the stream of export.

The crucial facts are documented in two telexes (LL&E Exhibits A & B attached as Appendix A) confirming the sales agreements whereby LL&E was to deliver the jet fuel to Pilot "VIA VESSEL FOB [FREE ON BOARD] MOBILE . . . NAME: MARYANNE . . . FLAG: LIBERIAN . . . ." In accordance with the sales agreements, LL&E delivered the jet fuel aboard the Liberian M/T MARYANNE at Mobile.

It is a statement of fact as well as law that the Liberian flag M/T MARYANNE was strictly prohibited by federal statute, 46 U.S.C. § 883, from redelivering the jet fuel at any U.S. port under penalty of forfeiture of the entire cargo. This statute, the Merchant Marine Act of 1920, provides:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise . . . between points in the United States . . . either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by . . . citizens of the United States. . . .

The sales agreements between LL&E and Pilot specified a foreign vessel as the place of delivery of the product

to be sold. This designation was notice to the world that at the moment the jet fuel was delivered by LL&E onboard the Liberian M/T MARYANNE and the tax was imposed, that fuel was destined by law for export to a foreign country and unequivocally in the stream of foreign commerce.

The only other fact relevant to the constitutionality of a state tax upon this sale is that the MARYANNE did carry the cargo from Mobile to Canada as intended by Pilot. (See Tanker Bill of Lading No. 2, attached Appendix B to this brief). When LL&E invoiced Pilot for the jet fuel and added Alabama state tax, Pilot paid the invoice value of the jet fuel, but protested LL&E's attempt to collect $55,790.78 in sales tax and refused to pay it. LL&E nevertheless paid the sum to Alabama and thereafter petitioned the Alabama State Department of Revenue for reimbursement, asserting as one basis for the refund, **"Product went to Canada, therefore purchaser claims that it is not taxable."** (See copy of petition for refund attached as Appendix F at p. 11f of Alabama's Petition for Certiorari). The Alabama Department of Revenue denied LL&E's petition. (See Appendix C to this Brief in Opposition)

On March 4, 1988 LL&E, as agent to collect taxes for the State of Alabama, brought suit against Pilot in the United States District Court for the Eastern District of Louisiana, alleging that LL&E had reported and paid taxes to the Alabama Department of Revenue on the sale of jet fuel to Pilot delivered "FOB the MARYANNE, a tanker flying the Liberian flag." (LL&E's Complaint, Paragraph 10, Appendix D). LL&E asserted that Pilot was subject to collection of the taxes and must pay them.

Pilot responded by filing an Exceptive Allegation and Answer, excepting to the personal and subject matter jurisdiction of the court and asserting a general denial. (Appendix C of Alabama's Petition for Certiorari). In Paragraph 10 of its answer, Pilot admitted that the fuel

had been delivered aboard a Liberian flag vessel and specifically denied "that said transaction gave rise to any liability for payment of taxes to the State of Alabama by Defendant or Plaintiff."

Thereafter, plaintiff LL&E filed a Motion for Summary Judgment for the amount of tax claimed. Defendant Pilot opposed LL&E's Motion and moved for Summary Judgment seeking a dismissal of the Complaint on the grounds that the terms and conditions of sale and delivery constituted an export of goods, and that the Alabama tax imposed on this export violated U.S. Const. art. I, § 10, cl. 2, as interpreted in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct 156, 91 L.Ed. 80 (1935) and other opinions of this Court. .

The District Court granted LL&E's Motion and denied the Pilot's Motion on August 10, 1988. The Court gave written reasons for its decision on August 29, 1988, and rendered final judgment August 31, 1988 (Appendix B of Alabama's Petition for Certiorari).

On September 12, 1988 defendant Pilot filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The matter was briefed by Pilot, with particular emphasis on the constitutional question. Pilot notified the Attorney General of Alabama and voluntarily sent him copies of its briefs. The appeal was thereafter argued to the Fifth Circuit, which certified the issue to the State of Alabama pursuant to 28 U.S.C. § 2403(b). The Alabama Attorney General then filed a "Brief of Intervenor" on July 20, 1989.

On May 10, 1990 the Fifth Circuit reversed the decision of the district court and issued an Opinion holding that the Alabama fuel tax as applied in this case was an unconstitutional impost upon an export within the meaning of the Import-Export Clause. (See copy of the Fifth Circuit's opinion, published as *Louisiana Land and Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th

Cir. 1990), attached as Appendix A of Alabama's Petition for Certiorari).

Thereafter, on August 8, 1990, the Alabama Department of Revenue petitioned this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I. FEDERAL LAW DICTATES THAT CARGO DELIVERED AT A U.S. PORT TO A FOREIGN VESSEL IS NECESSARILY IN THE EXPORT STREAM

This Honorable Court has long enforced 46 U.S.C. § 883, cited above, to prohibit foreign vessels from carrying cargo between ports of the United States. *Central Vermont Transp. Co. v. Durning*, 294 U.S. 33, 55 S.Ct. 306, 179 L.Ed. 741 (1935). The prohibition stands today, except for certain situations specified in the statute that are not applicable here. Pursuant to this relevant statute, the Merchant Marine Act of 1926, both LL&E and the Alabama Department of Revenue knew, or should have known, that at the moment the sale took place as LL&E delivered the jet fuel aboard the foreign vessel, it was necessarily an export cargo.

The only issues before this Honorable Court, therefore, are whether Alabama is constitutionally prohibited from directly taxing goods in transit as exports to a foreign country, and whether Pilot, having been sued in the Eastern District of Louisiana by an agent of Alabama to collect the tax, is entitled to assert the Import-Export Clause of the U.S. Constitution as a defense to this suit to collect taxes. Jurisprudence of this Honorable Court and the lower courts is well settled as to both issues and supports the Fifth Circuit's decision in this case. Pilot respectfully submits that there is no need to revisit them by granting certiorari in this case.

II. NEITHER THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, NOR THE DOCTRINE OF FEDERAL-STATE COMITY PROHIBITED THE FEDERAL DISTRICT COURT OR THE FIFTH CIRCUIT FROM DETERMINING THE CONSTITUTIONALITY OF THE ALABAMA TAX IN A SUIT BROUGHT ON BEHALF OF ALABAMA

Title 28 U.S.C. § 1341, known as the Tax Injunction Act of 1937, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

However, this statute does not deprive a federal district court of jurisdiction to determine the constitutionality of the tax in an action brought by a state or its agent in Federal Court to collect the tax. Nor does it prevent a defendant in such a proceeding from raising the defense of unconstitutionality of a state tax upon an export.

Prior jurisprudence holds that Alabama's reliance on the Tax Injunction Act and the doctrine of comity is misplaced. The Tax Injunction Act may bar federal jurisdiction of offensive actions by taxpayers in Federal Court to inhibit the collection of state taxes, but it does not apply where the state chooses the Federal Court as the forum to collect taxes which may be unconstitutional. Although 28 U.S.C. § 1341 is designed to eliminate interference by Federal Courts in matters of internal state economy and taxation, the statute does not bar the state itself from invoking the jurisdiction of the Federal Courts. *State of Arizona v. Atchison, Topeka & Santa Fe Railroad Co.*, 656 F.2d 398 (9th Cir. 1981).

This Honorable Court has already refused to disturb a ruling of the Fifth Circuit under similar circumstances. In *Appling County v. Municipal Electric Authority of*

Georgia, 621 F.2d 1301 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980), the Fifth Circuit held that the Tax Injunction Act and the judicial abstention doctrine did not apply where a plaintiff state agency filed suit in Federal Court to **collect taxes.** This Honorable Court denied certiorari. See also *Moton v. Lambert*, 508 F.Supp. 367 (N.D.Miss. 1981).

Alabama statutory law imposes administrative burdens on its licensed distributors. In this case, the Alabama Tax Code required LL&E to act as the state's agent to collect taxes on sales of fuel for the State Department of Revenue (Ala. Code § 40-17-31(d)(1) and (e) and § 40-17-32; See copies of these statutes attached as Appendix H of Alabama's Petition for Certiorari).

By the time that LL&E brought this action in the Eastern District of Louisiana, Pilot had become a licensed distributor in the State of Alabama and was subject to suit there. However, in choosing the Federal Court in Louisiana as its forum to collect the Alabama tax, LL&E, as Alabama's statutory agent, removed this case from the scope of the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits federal courts from enjoining state tax collection "where a plain, speedy and efficient remedy may be had **in the courts of such state.**" (Emphasis supplied). Alabama's agent for tax collection chose not to pursue this claim in the courts of the State of Alabama. In short, Pilot did not file this suit in the Eastern District of Louisiana to challenge the Alabama tax. LL&E filed it to *collect* the tax, and Alabama is bound by its agent's choice of forum.

All of the cases cited in Alabama's Petition for Certiorari concerning the Tax Injunction Act and the doctrine of comity were actions filed in federal courts by plaintiff taxpayers against the taxing states, a procedural posture far different from this case where Alabama has bypassed its own state courts and chosen to pursue its claim in

federal court. Pilot has challenged the constitutionality of the Alabama tax in the only forum where it can assert its defense. Under these circumstances, the Tax Injunction Act clearly does not deprive federal courts of jurisdiction to decide this case.

Indeed, if 28 U.S.C. § 1341 does in fact bar a federal court from determining the merits of Pilot's constitutional defenses in the state's suit to collect state taxes, the statute should likewise divest that court of jurisdiction to determine the merits of Alabama's claim to those same taxes. Does Alabama contend that the district court had jurisdiction only to enforce collection of state tax under Alabama Code § 40-17-31, but lacked jurisdiction to consider any valid defense to the suit?

III. THE LAW OF ALABAMA DOES NOT AFFORD PILOT A PLAIN, SPEEDY AND EFFICIENT REMEDY IN THE COURTS OF SUCH STATE

Furthermore, Alabama Code § 40-1-34 (Appendix E to this brief) provides for refunds only to taxpayers who pay taxes *directly* to the Department of Revenue.[1] In the

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[1] Alabama Code § 40-1-34, in pertinent part, provides as follows:

Refund on overpayment made directly to department of revenue.

Where any taxpayer in the payment of taxes or licenses which are paid directly to the department of revenue, by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the comptroller is authorized to draw his warrant on the treasurer in favor of such taxpayer, and the treasurer is authorized to pay such warrant for the amount of such overpayment or erroneous payment.

Before any refund under this section can be made, the taxpayer, his heirs, successors or assigns shall file in duplicate a petition directed to the department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within three years from the date of such payment.

instant case, because LL&E, not Pilot, directly paid the tax, only LL&E had standing to pursue or exhaust any administrative remedies in Alabama to recover the tax it has paid. Indeed, LL&E filed a petition for refund of the tax it reported and paid. The Department of Revenue addressed its Notice of Denial (Appendix C) to LL&E and declared:

> For the reasons stated above, the Alabama Department of Revenue must deny *your* [LL&E's] petition for refund of aviation excise tax in the amount of $55,790.78. [Emphasis added].

Pilot did not pay the tax to the state of Alabama, was not a party to LL&E's administrative proceeding, and had no right to pursue any remedies in Alabama to recover a tax paid by LL&E. Pilot did not distribute, consume, or store the fuel, but rather purchased it as an export for delivery to a foreign vessel for certain carriage to Canada. Pilot paid no taxes in Alabama and, according to the Alabama statutes, had no legal standing to petition or intervene in any state administrative proceeding for a refund of tax that LL&E had voluntarily paid in filing its own returns as an Alabama fuel distributor. LL&E was the licensed distributor who reported and paid this tax (See Alabama Code § 40-17-32 attached as Appendix H at p. 10h of Alabama's Petition for Certiorari). As the licensed dealer who filed the reports on its sales, LL&E was the only party who had standing to pursue a refund of money it should not have paid. See, Alabama Code §§ 40-1-34, 40-17-30, 40-17-33, and 40-17-40 (Attached as Appendix E to this Brief in Opposition)

The Alabama Department of Revenue's official response to LL&E's petition for refund of the state tax ostensibly paid on behalf of Pilot is directly contrary to the position taken by Alabama in its petition to this Honorable Court. Quoting its brief in the Court of Appeals, Alabama states at page 17 of its petition:

> **For the record, it is the State of Alabama's position that in fact Pilot could have been made a party to the administrative proceeding before the Department of Revenue.**

However, the only statement in the Department of Revenue's earlier Denial of Request for Refund (Appendix C) that could conceivably address a right to a refund of taxes imposed on an export, as claimed in the Petition for Refund, is as follows:

> Pilot did not become licensed as a distributor of gasoline with the Alabama Department of Revenue until December 15, 1986. **Pilot did not comply with the provisions of § 40-17-191 and may not claim this transaction was made in interstate commerce (sic) by properly licensed and bonded distributors.** [Emphasis supplied].

This is consistent with Alabama Code § 40-1-34 (Appendix E), which permits refunds only to taxpayers who pay taxes directly to the Department of Revenue.

Of greater import, under prevailing Alabama jurisprudence, Pilot has no standing to pursue a refund even if it had paid LL&E the tax invoiced by it. In *Texas Company v. Harold*, 228 Ala. 350, 153 So. 442 (1933), the Alabama Supreme Court specifically held that a purchaser, who had paid gasoline tax to an Alabama distributor on gasoline and oil purchased, was not entitled to recover the amount of the tax from the distributor, **even though the tax was declared invalid and was refunded by the Alabama taxing authorities to the distributor.** The Alabama Supreme Court noted in the *Texas Company* case that the purchaser of the fuel had **paid no tax directly to the county,** that the tax had been paid by the distributor in discharge of its own statutory obligation, and that no demand had ever been made upon the purchaser by any state agency (as in Pilot's case) for the payment of the tax.

Thus, insofar as its gasoline and fuel taxes are concerned, Alabama does not afford a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act for a fuel purchaser to seek a refund of a tax "passed on" to him by the fuel distributor. Pilot acted prudently by refusing to pay this illegal tax that LL&E should never have paid in the first place. Under the same circumstances, the Alabama Supreme Court held in *Texas Company*, supra, that a purchaser who pays the tax voluntarily has *no remedy*, even though the tax is invalid. Now that Alabama's agent has chosen a Federal Court in which to enforce collection of the questioned tax, Pilot is entitled to raise the unconstitutionality of the tax as a valid defense in light of the *Texas Company* ruling that a fuel purchaser has no standing to obtain a tax refund.

Alabama's arguments that the Fifth Circuit's decision on the constitutionality of the tax has interfered in the state's tax administration and fiscal affairs are likewise groundless. LL&E paid the tax, and the State of Alabama has apparently kept the tax payment to this day. Pilot is not attempting to recover the tax payment, nor is it attempting to have the fuel tax held unconstitutional in all cases or deprive Alabama of a legitimate source of revenue. Alabama still holds the revenue. Indeed, in its brief as intervenor in the Fifth Circuit, Alabama conceded that it cannot tax an export in transit and recognized that the fundamental issue in this case is whether the sale of the fuel from LL&E to Pilot is in fact an export transaction (Intervenor's brief, pp. 14-16, 38-42). Thus, the Fifth Circuit properly decided this narrow constitutional question without destroying Alabama's fuel taxation scheme, violating the doctrine of federal-state comity, or intruding into Alabama's affairs of state. Furthermore, it is of great moment that the U.S. Constitution is specifically intended to take precedence over any state law affecting international commerce. United States Constitution, Article I, § 10, Cl. 2.

This Court should also note that LL&E's petition to the Alabama Department of Revenue specifically stated:

> Product went to Canada, therefore purchaser claims that it is not taxable. [Appendix F at p. 11f of Alabama's Petition for Certiorari].

The District Court correctly observed that the Alabama Department of Revenue's Notice of Denial of the refund erroneously stated that Pilot had "arranged for this fuel to be shipped to another state." (Appendix B at p. 3b of Alabama's Petition for Certiorari). Clearly, Alabama should not be permitted to penalize Pilot for the Alabama Department of Revenue's painfully obvious misinterpretation of LL&E's simple petition for refund and should not be surprised by Pilot's reliance on the Import-Export Clause as a defense to a suit by Alabama's agent to collect the tax in Federal Court. Neither LL&E's refund petition nor the Department of Revenue's erroneous denial of it precluded Pilot from raising this legitimate defense in this action.

Alabama's reliance on *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 reh den (U.S.) 68 L.Ed.2d 864, 101 S.Ct. 2349 (1980, 1981), is misplaced. This latest expression of the Court concerning what constitutes "a plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act is distinguishable from the instant case. *Rosewell* dealt with a suit brought in Federal Court by a taxpayer *against* an agency of the state to recover tax paid to a county assessor. In contrast, in the case *sub judice*, an agent of the State of Alabama has brought suit against Pilot to collect the tax and selected the U.S. District Court in Louisiana as its forum. The instant case cannot be equated to the taxpayer's suit in *Rosewell*.

IV. THE FIFTH CIRCUIT PROPERLY HELD, CONSISTENT WITH THE DECISIONS OF THIS COURT, THAT THE ALABAMA TAX WAS AN UNCONSTITUTIONAL IMPOST OR DUTY ON AN EXPORT IN TRANSIT

The United States Constitution, Article 1, Section 10, Clause 2 provides:

> "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States; . . ."

Addressing the question of whether the tax violates the Import-Export Clause, Alabama erroneously contends at page 18 of its petition that the sale of the fuel by LL&E to Pilot occurred within the borders of Alabama and was not an export in international commerce. According to Alabama, LL&E's sale of the fuel to Pilot, *allegedly* an unlicensed distributor,[2] was a taxable "intrastate occurrence" (Alabama's petition at p. 20). Alabama erroneously declares:

> The sale from LL&E to Pilot Petroleum was not an "export". The fact that it was delivered to a foreign flagged vessel at Pilot Petroleum's direction would not make the sale to Pilot an export.

(Alabama's petition p. 19). Alabama further asserts that the tax was imposed because Pilot failed to obtain a license as a gasoline distributor that would have exempted it from the tax. (Alabama's petition at p. 20).

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[2] Ala. Code § 40-17-30—Definitions. (Appendix E)

(3) DISTRIBUTOR. Any person who engages in the *selling* of gasoline in this state by wholesale *domestic* trade, but shall not apply to any transaction of such distributor in interstate commerce. (Emphasis supplied). See copy of this statute attached as Appendix E to this brief.

In making these arguments, Alabama has overlooked undisputed evidence and applicable law establishing that this tax attached to this shipment of fuel when it was necessarily an export in transit to a foreign country. Whether or not Pilot was licensed under Alabama law does not remove this tax from the prohibition of the Import-Export Clause. The application of a statutory exemption does not determine the legality of the tax. Rather, the tax itself, as applied in this case, must comply with the requirements of U.S. Const. art. I, § 10, cl. 2 in order to be collectible.

This Honorable Court has never upheld the constitutionality of a state tax imposed directly on goods in transit in the *export stream.* The United States Supreme Court cases defining what is an "export" unburdened by such prohibited direct taxes are settled law. In *Empresa Siderurgica, S.A. v. County of Merced,* 337 U.S. 154, 157, 69 S.Ct. 995, 93 L.Ed 1276, 1280 (1949), this Court held:

> It is the entrance of the articles into the export stream that marks the start of the process of exportation. *Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use.* (Emphasis supplied).

Likewise, in *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 82, 67 S.Ct. 156, 91 L.Ed. 80, 92 (1946), this Court had held a similar tax on goods sold for delivery F.O.B. a foreign vessel to be **unconstitutional:**

> The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been *delivered to a common carrier for that purpose.* (Emphasis added).

The *Richfield* court held that oil bound for New Zealand had started upon its export journey when the purchaser furnished a ship to carry it abroad and the

oil was pumped into the hold of the vessel, f.o.b Los Angeles, from the vendor's tank. At that point, ". . . there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use", even though the vessel was berthed in California's territorial waters. 329 U.S. at 83. The *Richfield* court specifically noted:

> The means of shipment are unimportant so long as the certainty of the foreign destination is plain. *Id.*

Relative to exports, the Alabama Supreme Court has even invalidated as unconstitutional a statutory requirement that an export distributor pay a license fee. In *Collins v. Bay City Export Lumber Co.*, 260 Ala. 308, 70 So.2d 273 (1954), the Alabama Supreme Court relied on *Richfield* to conclude that a tax violates the Import-Export Clause when an element of the tax applies to goods delivered to a carrier for export. In *Collins*, a general Alabama license fee imposed on all lumber dealers was held unconstitutional as applied to wholesale dealers whose entire purchases and sales of lumber were for export from Mobile to foreign countries.

Alabama has no basis for contending that the sale by LL&E to Pilot was an intrastate or interstate transaction, rather than an export of the fuel to a foreign country. The initial telex confirmation of the agreement reached between LL&E and Pilot expressly provides for delivery to the Liberian flag vessel MARYANNE and states: "TITLE AND RISK OF LOSS TO THE PRODUCT DELIVERED SHALL PASS TO BUYER WHEN PRODUCT REACHES THE FLANGE CONNECTION BETWEEN THE DELIVERY HOSE AND THE VESSEL'S INTAKE AT LOAD PORT." (Appendix A). The bill of lading (Appendix B) states that the fuel was to be delivered on board the "exporting carrier" for carriage to Halifax, Nova Scotia. The sale did not occur, title did not pass to Pilot, and the tax did not attach on this shipment until delivery was taken aboard the foreign vessel for certain export to Canada.

Here, as in the *Richfield* case, *supra*, the tax was imposed directly on an export *in transit* when title transferred to Pilot as the fuel was pumped into the tanks of the foreign flag vessel. Alabama's arguments that the tax attached on a withdrawal and sale of fuel domestically within the borders of Alabama have no basis in this record and run contrary to the established law of the United States Supreme Court. Title did not pass to Pilot until the product was on board a foreign vessel in the "export stream" for carriage to a foreign country. *Empresa Siderurgica, S.A.*, 337 U.S. at 157.

The facts in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) relied on by Petitioner, are inapplicable in the instant case. In *Michelin*, imported tires were in storage with other goods in a wholesale distribution warehouse on January 1, 1972, and January 1, 1973, the dates when a county imposed an *ad valorem* tax on property in the state. A clear distinction between *Michelin* and the case at hand is that the Michelin tires were "imported goods that are no longer in transit" 423 U.S. at 286. But an "export" which is delivered aboard a foreign ship for carriage to a foreign country for consumption is clearly in transit under *Richfield* and just as clearly an "export". Again, in *R. J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S.Ct. 449, 93 L.Ed.2d 449 (1986), this Court reiterated that the tax at issue was on *imported* tobacco that was not "in transit." 479 U.S. at 154-155. In contrast, the Alabama tax sought to be imposed here is a prohibited direct tax on an export in transit.

In *Washington Revenue Department v. Stevedoring Assn.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), this Court addressed the constitutionality of a Washington state business and occupation tax applied to the business of stevedoring foreign goods. The Washington tax impacted the business of transporting cargo within the state, not the exported good themselves. *Washington*,

435 U.S. at 755. This Court specifically noted that it did not reach the question of applying the *Michelin* doctrine when a state directly taxes imports or exports in transit. *Washington*, 455 U.S. at 757, n. 23. The Fifth Circuit properly distinguished the indirect tax involved in *Washington* and recognized that the Alabama fuel tax as applied to this shipment of fuel was a prohibited direct tax on the exported cargo itself.

Moreover, in examining the nature and constitutionality of the Alabama tax, the Fifth Circuit carefully considered the specific policies that this Court identified in *Michelin* as serving the Import-Export Clause. 900 F.2d at 819-821. The Court of Appeals correctly noted that, unlike the *ad valorem* property tax in *Michelin* and the income tax in *Washington*, the Alabama tax levied directly on this shipment of exported jet fuel is a transit fee that defeats the historical objectives of the Import-Export Clause. 900 F.2d at 821. A state tax imposed on goods as they cross the rail of a ship bound for a foreign port necessarily impacts the foreign purchaser and commercial relations of the United States with foreign countries. Applying the *Michelin* analysis, the Fifth Circuit reached the proper result consistent with the latest pronouncements of this Court.

Alabama has no basis for asserting at page 21 of its petition that the Fifth Circuit has set "a new and radically different standard than any seen so far". To the contrary, the Fifth Circuit properly considered and soundly applied the decisions of this Court to conclude that "the Import-Export Clause was specifically intended to prevent the type of taxation involved in this case." 900 F.2d at 820. Alabama has stated no valid reason for questioning the Fifth Circuit's well reasoned opinion that is squarely within the holdings of this Court.

Alabama bases its entire argument for collecting the tax on the erroneous premise that the sale of fuel by LL&E to Pilot "was not in foreign commerce, and as

such, cannot be considered to be an export by LL&E." (Intervenor's brief, p. 39; Petition for Certiorari, p. 24). As shown above, under the decisions of this Court and the provisions of 48 U.S.C. § 883, LL&E exported the fuel when it transferred it from its tanks to the holds of a foreign flag tanker. This sale, both in fact and in law, was an export transaction clearly not subject to the Alabama fuel tax even under Alabama's view of its own law. Under these circumstances, there is no need for this Court to grant a writ where Alabama concedes it cannot tax an export in transit and has simply misunderstood the term "export" as specifically defined in *Richfield* and *Empresa Siderurgica*.

CONCLUSION

This case does not merit a grant of certiorari. The Fifth Circuit correctly decided this case in line with the decisions of this Court. Because of the unique procedural history involved, this case presents no frequently recurring issue that will affect the course of federal or state law beyond this litigation.

Neither the Tax Injunction Act nor the doctrine of Federal-State comity prevented the Federal District Court for the Eastern District of Louisiana or the Fifth Circuit from addressing the constitutionality of an Alabama tax on exports in this Federal proceeding filed in Louisiana against Pilot by LL&E, a statutory agent of Alabama, to collect the tax. Alabama received payment of the tax from LL&E and presumably kept the payment, having denied LL&E's Petition for Refund. Thus, there can be no claim of interference with Alabama's tax collection. Moreover, the Alabama Tax Code declares that Pilot has no legal standing to seek refund of the tax because it did not pay the tax *directly*, and was not a *licensed distributor* at the time of sale. Additionally, the Alabama Supreme Court has held in *Collins*, *supra*, that a purchaser who pays tax to a distributor has no right of

action against the distributor, even though the tax is refunded to the distributor. Therefore Pilot has *no* remedy under Alabama law.

Pilot's only protection from this unconstitutional direct tax on an export in transit was to raise this defense based on the Import-Export Clause in this federal action brought by Alabama's agent to collect the tax. It is settled law of this Honorable Court and the Alabama Supreme Court that the Alabama tax, as applied in this case, is an unconstitutional impost or duty on an export. The Fifth Circuit correctly applied the decisions of this Court to hold the Alabama tax unconstitutional in this case.

For the foregoing reasons, Pilot respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT B. DEANE *
DOUGLAS L. GRUNDMEYER
CHAFFE, MCCALL, PHILLIPS
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163
(504) 585-7000
Counsel for Respondent
Pilot Petroleum Corp.

* Counsel of Record

September 7, 1990

APPENDICES

APPENDICES

APPENDIX A

EXHIBIT A

EASYLINK 7012484A001 4NOV86 12:22/12:23 EST

FROM: TLX 759311 KARBON HOU
KARBON CORP

TO: 584478

4 NOVEMBER 1986

TO: THE LOUISIANA LAND & EXPLORATION CO.
ATTN: BOB COOPER

KC TRANSACTION NO. 1468

WE ARE PLEASED TO CONFIRM THE FOLLOWING PURCHASE/SALE AGREEMENT REACHED BETWEEN THE LOUISIANA LAND & EXPLORATION CO. AND PILOT PETROLEUM CORPORATION.

SELLER: THE LOUISIANA LAND & EXPLORAATION CO.

BUYER: PILOT PETROLEUM CORPORATION

PRODUCT: JET-FUEL OIL

QUANTITY: APPROXIMATELY 100,000 BARRELS PLUS/MINUS 5/

PRICE: .4100 CENTS PER GALLON FOB MOBILE, ALABAMA.

QUALITY: MEETING 110 FLASH MIN. OTHERWISE MEETING COLONIAL PIPELINE "54 GRADE" JET-FUEL OIL SPECIFICATIONS.

DELIVERY: 6-8 NOVEMBER 1986, VIA VESSEL FOB MOBILE, ALABAMA. THE LOUISIANA LAND & EXPLORATION CO. MAX. DRAFT IS 34 FT.

VESSEL DIMENSIONS:

NAME: MARYANNE

FLAG: LIBERIAN

DWT: 63,224

DRAFT: 42.1 FT.

LOA: 750 FT.

BEAM: 105.6 FT.

PAYMENT: WIRE TRANSFER IN FEDERAL FUNDS WITHIN 48 HOURS UPON RECEIPT OF SELLER'S TELEX INVOICE AND COPY OF INSPECTION PAPERS AND PROPER SUPPORTING DOCUMENTS.

INSPECTION: MUTUALLY AGREEABLE INDEPENDENT PETROLEUM INSPECTOR TO BE APPOINTED FOR QUALITY AND QUANTITY W/ COST TO BE SHARED EQUALLY.

MEASUPEMENT: AS WITNESSED AND REPORTED BY INSPECTOR AT LOADPORT, TO BE DETERMINED BY SHORE TANK DOWN GAUGE OR METERS, WHICHEVER APPLICABLE.

TITLE & RISK: TITLE AND RISK OF LOSS TO THE PRODUCT DELIVERED SHALL PASS TO BUYER WHEN PRODUCT REACHES THE FLANGE CONNECTION BETWEEN THE DELIVERY HOSE AND VESSEL'S INTAKE AT LOAD PORT.

LAYTIME: 36 HOURS PLUS 6 HOURS SHINC.

DEMURRAGE: AS PER CHARTER PARTY RATE AGREEMENT.

ARBITATION: LOUISIANA STATE LAW TO APPLY. INCOTERMS OF 1980 & LATEST AMENDMENTS TO APPLY.

NOTICES: FOR NOMINATIONS ETC., TO ISSUED THROUGH KARBON CORPORATION ATTN: ELLAN BORNEMAN.

THIS TELEX CONFIRMS THE AGREEMENT REACHED BETWEEN BOB COOPER OF THE LOUISIANA LAND & EXPLORATION CO. AND MICHAEL DOMANSKI OF PILOT PETROLEUM CORPORATION THROUGH KECK KIMBELL OF KARBON CORPORATION. SHOULD THERE BE ANY DISCREPANCIES BY EITHER PARTY OF THE AGREEMENT AS EXPRESSED, PLEASE ADVISE THIS OFFICE WITHIN 24 HOURS OF RECEIPT OF THIS WIRE, OTHERWISE, THE TERMS EXPRESSED WILL BE BINDING BY BOTH PARTIES.

WE ARE PLEASED TO HAVE ARRANGED THIS TRANSACTION ON YOUR BEHALF.

REGARDS,
KARBON CORPORATION
KECK KIMBELL
TLX 759311 KARBON HOU

MMMM

LA LAND NLN

EXHIBIT B

DISK 2 PAGE 163
MESSAGE #394
RCV LN 1

LA LAND NLN

EASYLINK 7673110A001 7NOV86 11:58/12:00 EST
FROM: TLX 759311 KARBON HOU
KARBON CORP
TO: 584478

7 NOVEMBER 1986

TO: THE LOUISIANA LAND & EXPLORATION CO.
ATTN: TOM NORTH

KC TRANSACTION NO. 1480

WE ARE PLEASED TO CONFIRM THE FOLLOWING PURCHASE/SALE AGREEMENT REACHED BETWEEN THE LOUISIANA LAND & EXPLORATION CO. AND PILOT PETROLEUM CORPORATION.

SELLER: THE LOUISIANA LAND & EXPLORATION CO.

BUYER: PILOT PETROLEUM CORPORATION

PRODUCT: JET-FUEL OIL

QUANTITY: APPROXIMATELY 12,000 BARRELS

PRICE: .4375 CENTS PER GALLON FOB MOBILE, ALABAMA

QUALITY: MEETING 110 FLASH MIN. OTHERWISE MEETING COLONIAL PIPELINE "54 GRADE" JET-FUEL OIL SPECIFICATIONS.

DELIVERY: 6-8 NOVEMBER 1986, VIA VESSEL FOB MOBILE, ALABAMA. THE LOUISIANA LAND & EXPLORATION CO., MAX. DRAFT IS 34 FT.

VESSEL RESTRICTIONS:

NAME: MARYANNE

FLAG: LIBERIAN

DWT: 63,224

DRAFT: 42.1 FT.

LOA. 750 FT.

BEAM: 105.6 FT.

PAYMENT: WIRE TRANSFER IN FEDERAL FUNDS WITHIN 48 HOURS UPON RECEIPT OF SELLER'S TELEX INVOICE AND COPY OF INSPECTION PAPERS AND PROPER SUPPORTING DOCUMENTS.

INSPECTION: MUTUALLY AGREEABLE INDEPENDENT PETROLEUM INSPECTOR TO BE APPOINTED FOR QUALITY AND QUANTITY W/ COST TO BE SHARED EQUALLY.

MEASUREMENT: AS WITNESSED AND REPORTED BY INSPECTOR AT LOADPORT, TO BE DETERMINED BY SHORE TANK DOWN GAUGE OR METERS, WHICHEVER APPLICABLE.

TITLE & RISK: TITLE AND RISK OF LOSS TO THE PRODUCT DELIVERED SHALL PASS TO BUYER WHEN PRODUCT REACHES THE FLANGE CONNECTION BETWEEN THE DELIVERY HOSE AND VESSEL'S INTAKE AT LOAD PORT.

LAYTIME: 36 HOURS PLUS 6 HOURS SHINC.

DEMURRAGE: AS PER CHARTER PARTY RATE AGREEMENT.

ARBITATION: LOUISIANA STATE LAW TO APPLY. INCOTERMS OF 1980 & LATEST AMENDMENTS TO APPLY.

NOTICES: FOR NOMINATIONS ETC., TO BE ISSUED THROUGH KARBON CORPORATION ATTN: ELLAN BORNEMAN.

THIS TELEX CONFIRMS THE AGREEMENT REACHED BETWEEN TOM NORTH OF THE LOUISIANA LAND & EXPLORATION CO. AND MICHAEL DOMANSKI OF PILOT PETROLEUM THROUGH KECK KIMBELL OF KARBON CORPORATION. SHOULD THERE BE ANY DISCREPANCIES BY EITHER PARTY OF THE AGREEMENT AS EXPRESSED, PLEASE ADVISE THIS OFFICE WITHIN 24 HOURS OF RECEIPT OF THIS WIRE, OTHERWISE, THE TERMS EXPRESSED WILL BE BINDING BY BOTH PARTIES.

WE ARE PLEASED TO HAVE ARRANGED THIS TRANSACTION ON YOUR BEHALF.

REGARDS,
KARBON CORPORATION
KECK KIMBELL
TLX 759311 KARBON HOU

MMMM

LA LAND NLN

DURATION 554 SECS LISTED 11:07 CST 11/07/86

APPENDIX B

TANKER BILL OF LADING NUM #02

Shipped in apparent good order and condition by PILOT PETROLEUM CORPORATION on board the LIBERIAN Motorship "MARY ANN" whereof KIM YONG HU is Master, at the port of MOBILE, AL. a quantity said to be IN BULK "JET FUEL"

110,696.14 BBLS @ 60° F
4,649,237 GALS
13,885.44 L/T
14,108.28 M/T

STOWAGE IN TANKS # 1C, 2C, 5C, & 6C tons/barrels/gallons of AS PER ABOVE, the quantity, measurement, weight, gauge, quality, nature, value and condition of the cargo unknown to the Vessel and the Master, to be delivered at the port of 1 OR MORE SAFE PORTS EAST COAST CANADA or so near thereto as the Vessel can safely get, ways afloat, unto TO THE ORDER OF BANQUE INDOSUEZ order on payment of freight at the rate of PAYABLE AS PER CHARTER PARTY This shipment is carried under and pursuant to the terms of the Charter dated ..... between ..... d ..... as Charterer, and all the terms whatsover the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.

If this Bill of Lading is a document of title to which the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, or similar legislation giving statutory effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels of August 25, 1924, applies by reason of the port of loading or discharge being in territory in which the said Act or other similar legislation is in force, this Bill of Lading shall have effect subject to the provisions

of the said Act or other similar legislation, as the case may be, which shall be deemed incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act or other similar legislation. If any term of this Bill of Lading is repugnant to the said Act or other similar legislation as so incorporated, such terms shall be void to that extent but no further.

In Witness Whereof, the Master has signed THREE (3) ORIGINALS AND NON-NEGOTIABLE COPIES Bills of Lading this tenor and date, one of which being accomplished, the other will be void.

Dated at MOBILE, AL. this 7th day of NOVEMBER 1986.

/s/ [Illegible]
Master

Shipper Exporter

Pilot Petroleum
Corporation
444 W. Ocean Blvd
Suite 1200
Long Beach, California

Consignee

To Order of
Banque Indosuez

Exporting Carrier
[Vessel/Airline]
"MARY ANN"

Air/Sea Port of Discharge
Halifax, Nova Scotia

Port of Loading
Mobile, Al.

Export References
RV/CX145554/IV

Forwarding Agent, References
Ralph Valls & Son Inc. FMC
#R942
c/o Marvin J. Madden Company
P.O. Box 1562, Mobile, AL.
36633

Point & Country of Origin
Mobile, Al. U.S.A.

Particulars Furnished by Shipper

Marks and Numbers
N/MN/N

No. of Pkgs.
In Bulk

Description of Packages and Goods
"Jet Fuel
No. 2 — Fuel Oil

Gross Weight
110,696.13 Bbls
4,649,237 Gals
13,885.84 L/T
14,108.26 MT

The undersigned Marvin J. Madden Co. (Agent), does hereby declare for the above named shipper, the goods described above were shipped on the above date and consigned as indicated and are products of the United States of America

Dated at Mobile, Al. on the 7th day of November 1986
Sworn to before me this 7th day of November 1986
Notary Public

/s/ Marvin J. Madden
Signature of Agent

[SEAL]

Notary Public

The Mobile Chamber of Commerce, a recognized Chamber of Commerce under the laws of the State of Alabama, has examined the manufacturer's invoice or shipper's affidavit concerning the origin of the merchandise, and, according to the best of its knowledge and belief finds that the products named originated in the United States of North America

/s/ [Illegible]
Secretary

APPENDIX C

[STATE SEAL]

STATE OF ALABAMA
DEPARTMENT OF REVENUE
Montgomery, Alabama 36130

August 31, 1987

Certified Mail
Return Receipt Requested

Mr. Fred Smith
LL&E Petroleum Marketing, Inc.
P.O. Box 60350
New Orleans, LA 70160

NOTICE
DENIAL OF REQUEST FOR REFUND

Re: Petition For Refund of Aviation Gasoline Excise Tax in the Amount of $55,790.78

Dear Mr. Smith:

Louisiana Land and Exploration Petroleum Marketing, Inc. (LL&E) sold approximately 4,649,232 gallons of aviation jet fuel to Pilot Petroleum Corporation (Pilot) during the month of November 1986. Pilot subsequently arranged for this fuel to be shipped to another state. LL&E filed their November 1986 Aviation Fuels Excise Tax return and paid to the Alabama Department of Revenue the excise tax due on this sale of aviation gasoline. The Alabama Department of Revenue received a petition for refund of this tax on August 24, 1987.

Section 40-12-191, *Code of Alabama 1975*, requires every distributor of gasoline to be licensed by the Alabama Department of Revenue before engaging in the business of

selling, distributing or withdrawing gasoline from storage in this State. Section 40-17-30, defines a distributor as any person who engages in the selling of gasoline in this State by wholesale domestic trade, but shall not apply to any transaction of such distributor in interstate commerce. Pilot did not become licensed as a distributor of gasoline with the Alabama Department of Revenue until December 15, 1986. Pilot did not comply with the provisions of Section 40-17-191 and may not claim this transaction was made in interstate commerce, and thus not subject to taxation, as provided for in Section 40-17-30. It is not the intention of the Alabama Department of Revenue to tax transactions made in interstate commerce by properly licensed and bonded distributors.

Section 4-17-31(d)(1), requires every distributor, refiner, retail dealer, storer or user of gasoline, to be used as a fuel to propel aircrafts, to collect and pay over to the Department of Revenue an excise tax upon the selling, use or consumption, distributing, storing or withdrawing from storage in this State any gasoline used to propel aircraft. Section 40-17-32, requires persons to collect the excise tax, imposed by Section 40-17-31, upon the storing of gasoline or distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals are for sale or for other use, whether same is used or consumed in this State in any manner or for any purpose or whether such gasoline is withdrawn from storage in this State or not. Pilot was not a licensed distributor of gasoline with the Alabama Department of Revenue at the time they purchased the aviation gasoline from LL&E. LL&E made a sale in Alabama to Pilot, an unlicensed distributor, and remitted the proper aviation gasoline fuel tax to the Alabama Department of Revenue.

For the reasons stated above, the Alabama Department of Revenue must deny your petition for refund of aviation excise tax in the amount of $55,790.78.

Attached is information concerning your rights to appeal this decision.

Please contact me if I may be of further service.

Very truly yours,

Natural Resources and License Tax Division

/s/ Verlon R. Frost
VERLON R. FROST
Supervisor
Motor Fuels Section

VRF/jc

Enclosure

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-0945

SECT./MAG. 1

THE LOUISIANA LAND AND EXPLORATION COMPANY

versus

PILOT PETROLEUM CORPORATION

COMPLAINT

The Complaint of The Louisiana Land and Exploration Company ("LL&E") respectfully represents that:

1.

Plaintiff is a corporation organized under the laws of the State of Maryland and having its principal place of business in New Orleans, State of Louisiana.

2.

Made defendant herein is Pilot Petroleum Corporation, a corporation organized under the laws of the State of Delaware, having its principal place of business in the State of California, qualified to do business and in fact doing business in the State of Louisiana, and maintaining an office in New Orleans, Louisiana.

3.

This Court has jurisdiction over this proceeding by virtue of 28 U.S.C. § 1332, and is a court of proper venue pursuant to 28 U.S.C. § 1391(c).

4.

On November 4, 1986, Karbon Corporation, as broker, transmitted to plaintiff a telex confirming the sale by plaintiff to defendant of approximately One Hundred Thousand (100,000) barrels of jet fuel oil at the price of .4100 cents per gallon, FOB Mobile, Alabama. A copy of the November 4, 1986 telex and cover letter is attached as Exhibit A.

5.

On November 7, 1986, Karbon Corporation as broker transmitted to plaintiff a telex confirming the sale by plaintiff to defendant of approximately Twelve Thousand (12,000) barrels of jet fuel oil at the price of .4375 cents per gallon, FOB Mobile, Alabama. A copy of the November 7, 1986 telex and cover letter is attached as Exhibit B.

6.

In accordance with its standard practice, plaintiff sent to defendant telex copies of formal agreements pertaining to the sale of jet fuel called for by the telexes attached as Exhibits A and B. Copies of these formal agreements, dated November 4, 1986 and November 7, 1986, respectively, are attached hereto as Exhibits C and D.

7.

Exhibits C and D each incorporate by reference the terms of plaintiff's standard General Provisions, a copy of which is attached hereto as Exhibit E.

8.

Through the course of dealing between plaintiff and defendant, defendant also had possession of and familiarity with the terms of Exhibit E before entering the sales agreements herein alleged, and before accepting the jet fuel from plaintiff.

9.

The General Provisions attached as Exhibit E provide in pertinent part as follows:

> 5. TAXES: . . . Should any product taxes, fees or charges be imposed on the Delivering Party by any federal, state, or municipal agency as a direct result of this sale or the manufacture, storage, delivery, receipt, or inspection thereof, the Receiving Party will reimburse the Delivering Party for all such taxes, duties, or fees legally required to be paid and paid in respect of the product delivered by it. Should the Receiving Party fail to reimburse Delivering Party, Delivering Party will be entitled to collect reimbursement, damages incurred as a result of non-payment, and reasonable attorney's fees incurred in collection thereof from the Receiving Party.

10.

On or about November 9, 1986, as called for in the agreement of sale, plaintiff completed delivery of all the jet fuel oil called for in Exhibits A, B, C and D at the Port of Mobile, FOB the MARYANNE, a tanker flying the Liberian flag, and defendant accepted the jet fuel without objection.

11.

Plaintiff has performed all of its obligations as set forth in Exhibits A, B, C, D and E.

12.

On November 13, 1986, plaintiff sent to defendant a telex invoice in the amount of $201,929.78, representing $196,539.00 due for jet fuel called for in Exhibit B and D, together with Alabama jet fuel tax in the amount of $5,390.78. A copy of the invoice is attached as Exhibit F.

13.

On November 21, 1986, plaintiff sent to defendant a telex invoice in the amount of $1,772,400.00, representing $1,722,000.00 due for jet fuel called for in Exhibits A and C, together with Alabama jet fuel tax in the amount of $50,400.00. A copy of the invoice is attached as Exhibit G. The Alabama jet fuel taxes referred to in paragraphs 12 and 13 hereinabove are hereinafter sometimes referred to as "the taxes."

14.

In compliance with Alabama law, plaintiff reported and paid the taxes in connection with its November 1986 Aviation Fuels Excise Tax return.

15.

Defendant represented to plaintiff that defendant was properly licensed and bonded as a distributor of gasoline with the Alabama Department of Revenue at the time defendant purchased the jet fuel called for in Exhibits A, B, C and D and thus exempt from payment of the taxes under the Alabama state law exemption for sales in interstate commerce to licensed distributors.

16.

In reliance on defendant's representations that it was properly licensed and bonded as a distributor in Alabama and thus exempt from payment of the taxes, plaintiff forebore collecting the taxes from defendant and filed a petition for refund with the Alabama Department of Revenue on August 24, 1987.

17.

On August 31, 1987, the Alabama Department of Revenue notified plaintiff that the petition for refund was denied in full, due to the fact that, contrary to defend-

ant's representations, defendant was not properly licensed in Alabama as a distributor of gasoline and thus defendant was subject to collection of the taxes. A copy of the Notice of Denial of Request for Refund is attached as Exhibit H.

18.

By letters dated September 10, 1987 and January 19, 1988, copies of which are attached as Exhibits I and J, plaintiff has made repeated amicable demand upon defendant for payment of the taxes.

19.

Nevertheless, defendant has never reimbursed plaintiff for the taxes.

20.

Based on applicable law; the provisions of Exhibit E; defendant's own misrepresentations; and principles of unjust enrichment, defendant is responsible to plaintiff for $55,790.78 in Alabama jet fuel tax, together with legal interest, attorneys' fees and costs.

WHEREFORE, the premises and annexed documents being considered, The Louisiana Land and Exploration Company, Plaintiff herein, respectfully prays that summons and process be issued; that, defendant, Pilot Petroleum Corporation, be duly cited to appear; that, after due proceedings had, judgment be entered in favor of plaintiff and against defendant, ordering defendant to pay to plaintiff the full principal sum of $55,790.78, together with interest, attorney's fees and costs as allowed by the contracts herein and by applicable law; and for all other general and equitable relief and for all orders and decrees necessary in the premises.

Respectfully submitted,

/s/ Katherine Goldman
KATHERINE GOLDMAN
JOHN F. LANDRUM
Trial Counsel
909 Poydras Street
Suite 2300
New Orleans, Louisiana 70112-1017
Telephone: (504) 569-7000

Attorneys for Plaintiff,
The Louisiana Land and Exploration Company

Of Counsel:

MILLING, BENSON, WOODWARD
HILLYER, PIERSON & MILLER

APPENDIX E

ALABAMA CODE

§ 40-1-34. Refund on overpayment made directly to department of revenue.

Where any taxpayer in the payment of taxes or licenses which are paid directly to the department of revenue, by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the comptroller is authorized to draw his warrant on the treasurer in favor of such taxpayer, and the treasurer is authorized to pay such warrant for the amount of such overpayment or erroneous payment.

Before any refund under this section can be made, the taxpayer, his heirs, successors or assigns shall file in duplicate a petition directed to the department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within three years from the date of such payment.

The department of revenue shall examine said petition and the records of the department of revenue, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the department of revenue, upon the evidence adduced, is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the comptroller stating the amount to be refunded by the state, the particular fund on which such warrant shall be drawn and forward to the comptroller a copy of the petition with the certificate attached, and if the comptroller shall be satisfied that the petition is in form required by law, he shall draw his warrant on the treasurer as hereinbefore provided for the amount certified to him by the department of revenue. (Acts 1931, No. 432, p. 527; Code 1940, T. 51, § 913; Acts 1951, No. 852, p. 1481, § 1.)

§ 40-17-30. Definitions.

For the purposes of this article, the following terms shall have the respective meaning ascribed by this section:

(1) GASOLINE. Gasoline, naphtha and other liquid motor fuels or any device or substitute therefor commonly used in internal combustion engines; provided, that nothing in this article shall be held to apply to those products known commercially as "kerosene oil," "fuel oil" or "crude oil" when used for lighting, heating or industrial purposes.

(2) PERSON. Persons, corporations, copartnerships, companies, counties, municipal corporations, school boards or agencies of the state, or other agencies, associations, incorporated or otherwise, singular or plural.

(3) DISTRIBUTOR. Any person who engages in the selling of gasoline in this state by wholesale domestic trade, but shall not apply to any transaction of such distributor in interstate commerce.

(4) REFINER. Any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel, as herein defined.

(5) RETAIL DEALER. Any person herein defined as a distributor who is also engaged in the selling of gasoline in this state at any place in this state in broken quantities.

(6) STORER. Any person who ships or causes to be shipped or receives gasoline into this state in any quantities and stores the same in any manner and withdraws or uses the same for any purpose.

(7) LESS COST OF COLLECTION AND ADMINISTERING and LESS THE COST OF COLLECTION. Any and all amounts appropriated from gasoline tax collections

by the legislature to the department of revenue for its operating expenses.

(8) USER. Any person who uses or consumes gasoline in this state in any manner or for any purpose; provided, that the term "user" is not to include any refiner who has a refinery or refineries located within the state of Alabama when using gasoline in the manufacturing or refining process, or any person who holds a federal permit to blend motor fuels under the federal law and statutes and who pays the federal excise tax on such motor fuels directly to the federal government, when such person uses gasoline in this state in such blending process. (Acts 1935, No. 194, p. 256; Code 1940, T. 51; § 646; Acts 1951, No. 847, p. 1477; Acts 1953, No. 772, p. 1036, § 1.)

§ 40-17-33. Report of sales and withdrawals.

On or before the twentieth day of each month, every distributor, refiner, retail dealer or storer of gasoline shall render to the department of revenue, on forms prescribed by the department, a true and correct statement of all sales and withdrawals of gasoline, as defined in this article, namely:

(1) All gasoline sold or delivered to an airport for use as aircraft fuel during the preceding month; and

(2) All other gasoline sold or delivered for any other use during the same period of time.

and shall furnish said department such other reasonable information as it may demand and require, upon blanks to be formulated and furnished by the department and, at the time of making such report, shall pay over to such department an amount of money equal to the excise tax levied under the provisions of this article. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 649; Acts 1945, No. 367, p. 590, § 2; Acts 1949, No. 649, p. 998, § 3; Acts 1961, No. 948, p. 1523; Acts 1963, No. 254, p. 662, § 2.)

§ 40-17-40. Effect of acceptance of money on recovery of balance.

The acceptance of any money paid for the excise tax provided for in this article shall in no way preclude the collection of the money actually due; provided, that the money actually paid shall constitute a credit against the money actually due. In the event of the payment of an amount in excess of the amount due, the state department of revenue may credit such excess upon the amount of tax due for any subsequent monthly period, or such excess may be refunded pursuant to the provisions of section 40-1-34; provided, that no refund shall be allowed by means of any such credit unless made within three years from the date of payment of such excess.